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THE QUIET REVOLUTION: DOWNSIZING, OUTSOURCING, AND BEST VALUE

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In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic growth. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs.[1]

We are today engaged in a quiet revolution that extends across the range of our activities.[2]

I. Introduction

A quiet revolution is permeating the Department of Defense [hereinafter DOD]. In this revolution, DOD leaders are battling for more money. The weapon: Office of Management and Budget [hereinafter OMB] Circular A-76.

This is not a secret weapon. In fact, members of DOD and the public sector are learning how Circular A-76 works: the federal government battles it citizens to see who may supply products and services more economically. Consider the following scenario: Officials at a military base solicit offers use Circular A-76 to compete base services. The government submits an offer. A small business also submits an offer, but loses the award--to the

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[1] FEDERAL OFFICE OF MANAGEMENT AND BUDGET [OMB] CIRCULAR A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, ¶ 4.a (Aug. 4, 1983) [hereinafter OMB CIR. A-76, CIRCULAR A-76, or A-76].

[2] Sheila E. Widnall, A Quiet Revolution, Remarks to Air Force Materiel Command Civilian Leaders (Oct. 29, 1996) <http://www.af.mil/cgi-bin/multigate/>. In her remarks, then-Secretary of the Air Force Widnall identified three areas of this revolution: operations, leadership, and acquisition. Secretary Widnall attributed changes in warfare methods to the revolution in operations. She specifically focused on how information technology has offered warfighters new ways to plan and train for war. In turn, new technology prompted the revolution in leadership. She noted that the military must ensure that its leaders are educated and motivated to lead in an era of highly technical warfare. Likewise, Secretary Widnall cited the acquisition revolution as the heart of supporting the forces. She isolated outsourcing as one impetus to "create a leaner, more responsive Air Force." *Id.* at 3. Her remarks apply equally to the rest of DOD.

government. In light of the above-quoted policy from Circular A-76, how may this happen? How may a private offeror even *compete* against the government to provide service, much less *lose* to the government?

Look to the same policy for the answer. Circular A-76 guides federal agencies when deciding whether to outsource[3] a commercial activity[4] or perform it in-house. This policy promotes three goals: achieve economy, keep government functions "in-house," and rely on the commercial sector for products and services only if more economical.[5] But, how does Circular A-76 mesh with the DOD's warfighting role? Simple: money. Dollar signs have caught the attention of many persons, both in and out of DOD. Some experts predict Circular A-76 DOD can save billions of dollars, money it may then use for readiness.[6] Talk to commanders at most any military base and you will probably hear them discuss

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[3] The term "outsourcing" refers to a government contractor performing a government function. The term "privatization" refers to the government divesting itself of a function. In this paper, I will focus only on outsourcing, and will interchange the term "outsourcing" with the phrase "contracting out."

[4] OMB CIR. A-76, *supra* note 1, ¶ 6.a. A commercial activity is a product or service that a federal agency performs, but could obtain from the private sector. *Id.* At Attachment A, Circular A-76 lists examples of commercial activities, such as audiovisual products and services; automatic data processing; health services; and industrial shops and services. It also lists installation support services; management support services; office and administrative services; printing and reproduction services; and transportation services. Circular A-76 cautions that the list is not exhaustive, but should help agencies identify commercial activities. Circular A-76 recommends agencies use "informed judgement on a case-by-case basis in making these decisions." *Id.* at attach. A.

[5] *Id.* at ¶ 6.

[6] *Defense Science Board Releases Report on "Achieving an Innovative Support Structure for 21st Century Military Superiority,"* Office of Assistant Secretary of Defense (Public Affairs), Jan. 24, 1997 <http://www.defenselink.mil/news/>. In its report, the Defense Science Board recommended DOD dramatically restructure its support infrastructure. It envisioned DOD operating only those support functions that are "inherently governmental," such as warfighting; battlefield support; and policy and decision-making. The private sector would provide all other functions through the competitive outsourcing process. The Defense Science Board concluded that this new "vision" for DOD could shift up to $30 billion per year from support functions to modernization by the year 2002. Composed of members from the private sector, the Defense Science Board is the senior advisory body of the Department of Defense. The Defense Science Board advises the DOD on scientific, technical, manufacturing, and other matters important to the DOD. *Id.*

"outsourcing." Peruse a news service covering DOD and you will probably find an article weighing the pros and cons of outsourcing.[7] According to Secretary of Defense William Cohen, the military services have made a difficult but necessary choice: "[t]o preserve combat capability and readiness, the Services have targeted the reductions by streamlining infrastructure and outsourcing non-military essential functions."[8]

What is Circular A-76? An old concept with a new look, Circular A-76 has emerged with new life as DOD looks for ways to maintain combat readiness with tight budgets and dwindling resources.[9] First promulgated in 1966, Circular A-76 permits public-private competitions to see which entity performs a commercial activity more economically. As it gained new life, Circular A-76 also received a new look. In March 1996, the OMB published

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[7] *See, e.g.*, Master Sergeant Louis A. Arana-Barradas, *Self-Interest Drives Outsourcing Boom*, AIR FORCE NEWS SERVICE (visited Mar. 30, 1998) <http://www.af.mil/cgi-bin/multigate/> (citing modernization dollars as the spark behind outsourcing for the Air Force); *Air Force Pursues Outsourcing, Privatization Programs*, AIR FORCE NEWS SERVICE, Jan. 3, 1997, <http://www.af.mil/cgi-bin/multigate/> (according to Former Air Force Chief of Staff Ronald R. Fogleman, outsourcing will help the Air Force sustain readiness "by competitively selecting suppliers to ensure we get the best possible support at the least cost to the service."); John Makulowich, *Outsourcing: Management Obsession or Savings Tool?*, WASHINGTON TECHNOLOGY, Apr. 24, 1997, *available in* 1997 WL 8578189 (calling outsourcing the "management mantra of the moment"); Kevin Power, *Feds, Get Used to Outsourcing*, GOVERNMENT COMPUTER NEWS, June 16, 1997, *available in* 1997 WL 11469304 (noting that federal agencies must accept that outsourcing is here to stay).

[8] William S. Cohen, Report of the Defense Quadrennial Review 6 (May 1997) [hereinafter QDR] <http://www.defenselink.mil/pubs/qdr/>.

[9] In the past, several laws inhibited DOD's efforts to outsource commercial activities. First, the National Defense Authorization Act for Fiscal Years 1988-1989 authorized installation commanders to decide whether to study commercial activities for potential outsourcing. Known as the Nichols Amendment and codified at 10 U.S.C. § 2468 (1994), this law expired on 30 September 1995. Many commanders opted not to outsource because of the how much a Circular A-76 study cost, how it disrupted the workforce, and how it created a potential loss of control a commander had over the workforce. Second, the 1991 DOD Appropriation Act (Pub. L. 101-511) and subsequent DOD appropriation acts prohibited DOD from funding lengthy Circular A-76 studies. Finally, the National Defense Authorization Acts for Fiscal Years 1993-1994 also prohibited outsourcing under Circular A-76 from 23 October 1992 to 1 April 1994. In 1996, the Office of Management and Budget revised its supplemental handbook to streamline and improve the Circular A-76 outsourcing process. *See* GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CHALLENGES CONFRONTING DOD AS IT RENEWS EMPHASIS ON OUTSOURCING 2-3, Report No. GAO/NSIAD-97-86 (Mar. 11, 1997).

a Revised Supplemental Handbook [hereinafter Supplement] to Circular A-76.[10] The Supplement changed how DOD and other federal agencies decide to contract out a commercial activity. Among its many changes,[11] the Supplement introduced "best value"[12] procurement to the Circular A-76 outsourcing process.[13] This change creates interesting issues. Circular A-76 is a cost-savings program. Yet, "best value" allows the government to pay more money for a better product or service. Of course, this seems to benefit the government--or does it? Despite "best value," Circular A-76 still requires the government to the public or private entity offering the lowest price for the product or service. How then does the concept of "best value" work in such a cost-driven program?

This is a tough question with no easy answers. This paper will analyze that question, focusing on three areas of Circular A-76 and the quiet revolution: policy, process, and

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[10] FEDERAL OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76, SUPPLEMENT, PERFORMANCE OF COMMERCIAL ACTIVITIES (March 1996) [hereinafter SUPPLEMENT].

[11] The OMB made significant changes in the Supplement. For example, it exempted certain activities from the Circular A-76 cost comparison process, broadened an agency's authority to waive cost comparisons, and required agencies to conduct post-performance reviews of at least 20 percent of all functions retained or converted in-house. The Supplement also refined the factors for costing in-house performance to ensure a level playing field. This included a standard overhead cost factor of 12 percent of the direct labor costs. Finally, the Supplement established a streamlined process for competing commercial activities with less than 65 full time equivalent employees. *See* ARMY LAW., Jan. 1997, at 111-12.

[12] Prior to the rewrite of Federal Acquisition Regulation Part 15, Contracting by Negotiation, [hereinafter FAR Part 15] the term "best value" referred to an acceptable offer more advantageous than a lower priced offer that justified paying a higher price. On 30 September 1997, the Government Printing Office published in the Federal Register the final rewrite of FAR Part 15 as Federal Acquisition Circular (FAC) 97-02. *See* Part 15 Rewrite, Contracting by Negotiation and Competitive Range Determination, Final Rule, 62 Fed. Reg. 51,224 (1997) [hereinafter Final Rules]. FAR Part 15 now defines "best value" as any acquisition that obtains the greatest overall value to the government. 62 Fed. Reg. at 51,224 (Final Rules, FAR 2.101). It specifically includes lowest priced, technically acceptable offers. 62 Fed. Reg., at 51,224 (Final Rules, FAR 15.101-2). The term "tradeoff approach" now refers to the traditional best value procurement. 62 Fed. Reg., at 51,224 (Final Rules, FAR 15.101-2). For a review of the changes to FAR Part 15, *see* ARMY LAW., Jan. 1998, at 25-30. In this paper, the term "best value" and "tradeoff approach" are interchangeable and refer to the traditional usage: the higher priced, more advantageous offer.

[13] SUPPLEMENT, *supra note* 10, at pt. I, ch. 3, ¶ H.3.c.

recourse. "Policy" sets the framework for Circular A-76, best reflected in the 1993 National Performance Review [hereinafter NPR],[14] the 1997 Quadrennial Defense Review [hereinafter QDR],[15] and the 1997 Defense Reform Initiative [hereinafter DRI].[16] "Process" sets Circular A-76 in motion, reviewing its procedures and isolating best value issues. "Recourse" sets the stage for analyzing the legal challenges to the Circular A-76 process. As an anchor, this paper will use a hypothetical Circular A-76 competition to illustrate key issues.

II. The Policy: Outsourcing and Downsizing

Often, policy is the compass directing what course of action leaders choose. At its highest levels, government has examined itself to discover where and how it might change. Within the federal government, leaders have called for a more streamlined, efficient government.[17] Within DOD, leaders have seized upon downsizing and outsourcing. Three documents represent the driving policy of downsizing and outsourcing: the National Performance Review, the Quadrennial Defense Review, and the Defense Reform Initiative.

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[14] Al Gore, Report of the National Performance Review, From Red Tape to Results, Creating a Government that Works Better & Costs Less (1993), *reprinted in* Gov't Cont. Rep. (CCH) No. 1199 (Sept. 15, 1993) [hereinafter NPR].

[15] QDR, *supra* note 8.

[16] William S. Cohen, Defense Reform Initiative Report (Nov. 1997) [hereinafter DRI] <http://www.defenselink.mil/pubs/DODreform/>.

[17] *See, e.g.*, Federal Acquisition Reform Act of 1996, Pub. L. No. 104-106, 110 Stat. 679 (1996); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994); Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410, Federal Workforce Restructuring Act of 1994, Pub. L. No. 103-226, 108 Stat. 111 (1994); and the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (1993).

A. The Policy: The National Performance Review

Established in 1993, the NPR set a lofty goal: establish a "new customer service contract with the American people" to mold an effective, efficient, and responsive government.[18] The NPR proposed four ways to implement this "customer service contract": cut red tape, put customers first, empower employees, and produce better government for less money.[19] Outsourcing fueled these keys to success. The NPR emphasized that public agencies should compete "for their customers--between offices, with other agencies, and with the private sector...."[20]

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[18] NPR, *supra* note 14, at 101-102.

[19] *Id.* at 121-122. When he announced the NPR on 3 March 1993, President Clinton stated he intended for it "to redesign, to reinvent, to reinvigorate the entire national government." *Id.* at 101. The NPR rallied around these goals. The NPR predicted its recommendations would revolutionize government by reducing waste, eliminating obsolete functions, improving services to the taxpayer, and creating a smaller, more productive government. *Id.* at 101.

[20] *Id.* at 149. The NPR concluded that forcing public agencies to compete for their customers would create a "permanent pressure to streamline programs, abandon the obsolete, and improve what's left." *Id.* It proposed four steps to break public monopolies and encourage federal employees to better serve their customers. First, it would require all federal agencies to give customers a voice in critiquing and improving government service. Ironically, the NPR singled out the Internal Revenue Service [hereinafter IRS] as one agency working hard to develop a customer focus. The IRS uses toll-free telephone numbers to serve taxpayers, uses electronic filing, and assigns one person to handle a taxpayer's repeat problems. *Id.* at 150-151. Second, the NPR would require agencies to compete for their customer's business. It noted that the federal government has created its own monopolies that serve its customers--federal workers--poorly. It identified government printing services as one public monopoly that has led to higher costs and more delays. The NPR proposed dismantling this and other public monopolies in favor of competing with the private sector. Stated succinctly, "[I]f [the Government Printing Office] can compete, it will win contracts. If it can't government will print for less, and taxpayers will benefit." *Id.* at 160. Third, when competition is not feasible, the NPR vowed to turn public monopolies into "businesslike enterprises." *Id.* at 150. It observed that some public activities do not lend themselves to competition, but are instead government-owned corporations. Examples include the Postal Service and the Tennessee Valley Authority. However, the NPR noted that even these corporations are still partial monopolies because they perform specific public tasks. To improve efficiency, the NPR recommended that the federal government subject its public agencies to business dynamics. For example, the NPR praised the National Technical Information Service [hereinafter NTIS] for its dramatic turnaround from near disaster. Established to distribute scientific and technical data, the NTIS lost money and customers from poor management. The NTIS responded to this crisis and streamlined its management practices. It reduced turnaround time on its orders, quickly resolved complaints, and answered all telephone calls. As a result, the NTIS regained its customers. *Id.* at 163. Finally, the NPR would rely less on new programs to solve problems, and more on market incentives. By this, the NPR meant using the power of the federal government to influence what happens in the private sector. It cited how the Roosevelt administration set home ownership as a national priority. The federal

Though it emphasized public-private competition, the NPR cited agency bias against outsourcing. It especially criticized DOD for not wholeheartedly embracing this concept. Noting that DOD faced a declining budget, the NPR concluded that DOD could no longer afford to conduct "business as usual." The NPR challenged DOD to erase its cultural bias against outsourcing.[21] It urged senior Pentagon leaders to face the outsourcing challenge squarely.[22] The DOD accepted this challenge, responding with the QDR and the DRI.

B. The Policy: The Quadrennial Defense Review

In the National Defense Authorization Act of 1997,[23] Congress mandated the QDR. By 15 May 1997, Congress required the Secretary of Defense to examine defense programs and polices "with a view towards determining and expressing the defense strategy of the United States" through the year 2005.[24] Congress presented the Secretary of Defense with a

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government did not build the homes, but created a mortgage loan that allowed buyers to only put down 20 percent and pay the loan over 30 years. *Id.* at 164.

[21] *Id.* at 161-62. The NPR observed that statutory roadblocks prevented DOD from outsourcing. It cited the 1993 National Defense Authorization Act, when Congress stopped DOD from outsourcing any further work to the contractors. It also cited how Congress required agencies to obtain their construction and design services from either the Army Corps of Engineers or the Naval Facilities Engineering Command. Thus, the NPR recommended that the administration propose legislation to remove these barriers. Moreover, it noted that the OMB would review Circular A-76 for potential changes to ease the contracting process. *Id.* at 162. The OMB review resulted in the SUPPLEMENT, *supra* note 10.

[22] NPR, *supra* note 14, at 161. The NPR observed that while DOD could not outsource command functions, it could outsource support functions like data processing, billing, and payroll. In fact, the NPR noted that the Pentagon's own defense contractors contract out similar functions.

[23] National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, §§ 921-926, 110 Stat. 2422, 2623-2628 (1996).

[24] *Id.* at § 922(6).

comprehensive list of areas to review, ranging from force structure and defense strategy to budget and infrastructure.[25]

When the Secretary of Defense presented the QDR to Congress on 15 May 1997, he announced that for the DOD to maintain the "tooth," or combat readiness of our national defense, it must cut the "tail," the support functions. Harkening to the NPR and its mission to reinvent government, Secretary Cohen stated that the DOD must choose between the military's core functions and the private-sector functions. Secretary Cohen noted a "leaner, more efficient, and more cost effective" DOD could serve the "warfighter faster, better, and cheaper."[26] For DOD, reducing infrastructure meant unleashing money to invest in combat readiness.

The QDR panel offered four ways for DOD to invest in combat readiness. First, the panel proposed further reducing civilian and military support personnel. Second, the panel recommended two additional rounds of base closures, one in 1999 and another in 2001.[27] Third, the panel proposed adopting private sector practices to improve support activities.[28]

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[25] *Id.* at §§ 923-926. Section 926 summarizes the required contents of the QDR. These areas include national security threats; the impact on the force structure in preparing for peace operations and operations other than war; the effect of new technology on the force structure; the impact of manpower and sustainment policies on conflicts lasting over 120 days; the role of the reserve component; airlift and sealift capabilities; and the impact of shifting defense resources among two or more theaters.

[26] QDR, *supra* note 8, § 8, at 6.

[27] *Id.* § 8, at 2. The QDR panel observed that DOD did not begin to save money from the initial round of base closures until 1996. It predicted that those savings would grow. However, the QDR panel also noted that DOD had enough base structure to warrant two more rounds of base closures. The QDR panel recommended not only closing bases and other support facilities, but also the laboratories and test ranges that support research, development, test, and evaluation.

[28] *Id.* § 8, at 2-3. The QDR panel did not elaborate on how DOD should adopt private sector practices. Instead, it noted that portions of the DOD infrastructure mirrored the private sector.

The panel also advocated outsourcing more "defense agency"[29] support functions to achieve both a "tighter focus" on essential tasks while also lowering costs.[30]

The QDR study is impressive--or is it?[31] After the Quadrennial Defense Review, DOD scrutinized its infrastructure to find even more ways to reduce, streamline, and

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[29] *Id.* § 8, at 3. "Defense agency" and "Defense-wide activities" perform service and supply functions common to more than one DOD component. According to the QDR panel, the 24 defense agencies and 80 defense-wide programs perform services as diverse as commissaries and intelligence. A sampling of these agencies include the Defense Logistics Agency, the Defense Financial Accounting Service, the Defense Information Service Agency, the Defense Investigative Service, and the On-Site Inspection Agency. *Id.*

[30] *Id.* § 8, at 2. The QDR panel recommended that DOD outsource more non-warfighting support functions. It predicted that DOD would enjoy the same benefits private industry gained from outsourcing: better quality, better responsiveness, better access to new technology, and lower costs. The panel justified its proposals on several grounds. First, it noted that 61 percent of DOD employees in Fiscal Year 1997 performed infrastructure, or support, functions. These functions included training; logistics support; central personnel services; headquarters functions; medical care; science and technology services; and command, control, and communication services. The QDR panel observed that DOD had reduced the total force structure by 32 percent from 1989 to 1997. Conversely, DOD only reduced the infrastructure force by 28 percent since 1989. Thus, the panel proposed cutting an additional 109,000 civilian and military personnel who perform support functions, boosting the total infrastructure force reduction since 1989 to 39 percent. The panel also suggested two additional rounds of base closures. The QDR panel also demanded that DOD reengineer its infrastructure in two ways. First, it stated that the DOD must streamline and consolidate redundant functions and adopt the lessons and best practices from the business sector. Second, the panel stated that DOD must outsource those military tasks that mirror commercial functions, especially in the logistics and support areas. *Id.* § 8, at 5-6.

[31] Prior to the Secretary of Defense releasing the QDR, the General Accounting Office addressed DOD's efforts to cut costs to fund modern weapons systems. In one report, the GAO noted that DOD could "achieve savings in military personnel accounts" by replacing active duty military personnel with less costly civilian personnel. According to the GAO, civilians cost less because they rotated less frequently. GENERAL ACCOUNTING OFFICE, DEFENSE BUDGET: OBSERVATIONS ON INFRASTRUCTURE ACTIVITIES 20-23, Report No. GAO/NSIAD-97-127BR (Apr. 4, 1997). In another report, the GAO applauded the DOD for its outsourcing push, but cautioned that each service must evaluate the individual cost benefits of outsourcing opportunities. The GAO questioned the projected DOD savings from outsourcing, noting that the services may not achieve such ambitious savings with a reduced force structure. If DOD could not achieve its projected savings, the GAO recommended Congress address the difficult issue of funding modern weapons systems. GENERAL ACCOUNTING OFFICE, DEFENSE OUTSOURCING: CHALLENGES FACING DOD AS IT ATTEMPTS TO SAVE BILLIONS IN INFRASTRUCTURE COSTS, Report No. GAO/NSIAD-97-110, *supra* note 9, at 3.

After the Secretary of Defense released the QDR, the House National Security Committee [hereinafter HNSC] expressed some concerns. It questioned DOD's plans to contract out 109,000 civilian positions between Fiscal Years 1998 and 2003. It also questioned how DOD could save money by contracting out military support positions while keeping those military personnel in the system. The HNSC further wondered if DOD would have enough resources to manage the increased contract workload from outsourcing. The HNSC directed the Secretary of Defense to further assess its outsourcing plans and report back on its projected costs and savings. H.R. REP. NO. 105-132, at 298-99 (1997). Finally, the HNSC criticized DOD for failing to "challenge the inertia of 'business as usual.'" Despite the QDR (which Congress directed DOD to prepare), the HNSC stated that DOD can no longer afford to further study reform. *Id.* at 293.

outsource. The Secretary of Defense commissioned a Task Force on Defense Reform. This Task Force produced the DRI.

C. The Policy: The Defense Reform Initiative

When he unveiled the DRI report on 10 November 1997,[32] Secretary of Defense William Cohen introduced it as a sweeping program to reform the "business" of the Department of Defense: "American business has blazed a trail and we intend to emulate their success. We have no alternative if we are to have the forces we need as we enter the 21st century."[33] To reshape DOD into an agile warfighting entity, the DRI expanded upon the QDR[34] to propose more streamlining and outsourcing.[35] The DRI recommended melding best business practices from the private sector into defense support activities. Along with the additional base closures, the DRI suggested DOD consolidate redundant organizations and outsource more in-house functions.

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[32] DRI, *supra* note 16.

[33] *Secretary Cohen Reshapes Defense for the 21st Century,* Office of Assistant Secretary of Defense (Public Affairs), Nov. 10, 1997 <http://www.defenselink.mil/news/>.

[34] *See supra* notes 27-30 and accompanying text.

[35] The DRI devotes a chapter to each cost-savings method it proposed. Chapter 1 highlights nine best business practices DOD plans to adopt. Some of these business practices include paperless contracting, increased use of the government purchase credit card (IMPAC card), and increased use of internet shopping. DRI, *supra* note 16, at 1. Chapter 2 focuses on reorganizing and reducing DOD headquarters elements, such as the Office of Secretary of Defense [hereinafter OSD] staff, Defense Agencies, DOD Field Activities, Defense Support Activities, and the Joint Staff. By reorganizing, the OSD will focus on the "corporate" level tasks, while lower echelons will focus on the operational tasks. With a slimmer headquarters, the DRI hopes DOD may resist mission creep: the temptation to take on new non-core functions. *Id.* at 15. Chapter 3 identifies outsourcing opportunities for DOD under OMB Circular A-76, such as payroll, personnel services, surplus property disposal, and drug testing laboratories. *Id.* at 27. Chapter 4 identifies ways DOD may eliminate unneeded infrastructure. For example, the DRI proposes two additional rounds of base closures; consolidating, restructuring, and regionalizing many support agencies; privatizing family housing; and privatizing all utility systems, except those needed for security reasons. *Id.* at 37.

The DRI set ambitious outsourcing goals for DOD.[36] By 1999, DOD plans to review its entire military and civilian force to identify commercial activities suitable for Circular A-76 review.[37] In Fiscal Year 1997 alone, DOD studied over 34,000 positions, mostly in base services, general maintenance and repair, and installation support.[38] By Fiscal Year 2002, DOD plans to study 150,000 more positions.[39] From outsourcing these positions, the DRI predicts DOD could save nearly $6 billion by Fiscal Year 2002.[40]

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[36] *See* GENERAL ACCOUNTING OFFICE, DEFENSE MANAGEMENT: CHALLENGES FACING DOD IN IMPLEMENTING DRIS, REPORT NO. GAO/T-NSIAD-98-122 (Mar. 13, 1998). In this report, the GAO noted that DOD faces a difficult task as it tries to implement the DRI. It supported the DRI, but observed that DOD needed to embrace other opportunities to save money and meet mission needs. In this regard, the GAO focused on four key points from the DRI. First, the GAO expressed concern that DOD will reduce future budgets based only on expected savings from Circular A-76 competitions and base closings. The GAO noted that these tools produced savings, but not as much or as quickly as DOD initially estimated. The GAO viewed DOD's approach as a readiness risk. Second, the GAO concluded that DOD failed to think broadly enough about how to implement its business reengineering reforms. DOD expected these initiatives to save money and provide quality service, but did not consider how to implement them in a timely, efficient, and effective manner. Third, the GAO found that DOD needed to fully capitalize on the savings potential from initiatives to consolidate, restructure, and regionalize functions. Finally, the GAO criticized DOD for not addressing systemic management problems that hamper change. It focused on service parochialism, lack of incentive to change, lack of goals to achieve change, and lack of data to measure change. *Id.* at 2-4. *See also* GENERAL ACCOUNTING OFFICE, DEFENSE INFRASTRUCTURE: CHALLENGES FACING DOD IN IMPLEMENTING REFORM INITIATIVES, Report No. GAO/T-NSIAD-98-115 (Mar. 18, 1998).

[37] DRI, *supra* note 16, at 27. The DRI also noted that the Department of Defense has established guidelines for pursuing public-private competitions for depot maintenance work. Depot maintenance is beyond the scope of this paper. However, Congress and the GAO are scrutinizing this area closely. By statute, the Department of Defense may use only 50 percent of its funds to contract for depot maintenance and repair work. 10 U.S.C. § 2466. This is a fertile and hotly contested area for cost savings as the private sector competes for more depot maintenance work. For a sampling of GAO reports on depot maintenance and repair, *see, e.g.,* GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: DOD'S DETERMINATION TO COMBINE DEPOT WORKLOADS IS NOT ADEQUATELY SUPPORTED, Report No. GAO/NSIAD-98-76 (Jan. 20, 1998); GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE COMPETITIONS: PROCESSES USED FOR C-5 AIRCRAFT AWARD APPEAR REASONABLE, Report No. GAO/NSIAD-98-72 (Jan. 20, 1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: INFORMATION ON PUBLIC AND PRIVATE SECTOR WORKLOAD ALLOCATIONS, Report No. GAO/NSIAD-98-41 (Jan. 20, 1998); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, Report No. GAO/T-NSIAD-97-112 (May 1, 1997); GENERAL ACCOUNTING OFFICE, DEFENSE DEPOT MAINTENANCE: UNCERTAINTIES AND CHALLENGES DOD FACES IN RESTRUCTURING ITS DEPOT MAINTENANCE PROGRAM, Report No. GAO/NSIAD-97-111 (Mar. 18, 1997).

[38] DRI, *supra* note 16, at 30.

[39] *Id.*

[40] *Id.*

What lessons may one take from these policy documents? Though many exist, one theme bubbles to the surface: outsourcing is fueling the quiet revolution, especially within DOD.

III. The Process: Circular A-76 Procedures[41]

A. The Process: An Overview

Like it or not, Circular A-76 is here to stay. Moving from policy to process, how does Circular A-76 work? Since 1966,[42] Circular A-76 has offered federal agencies a tool to save money when budgets dwindled. Several statutes,[43] directives,[44] and regulations[45]

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[41] For an overview of the Circular A-76 procedures, *see* Major Gregory S. Lang, *Best Value Source Selection in the A-76 Process*, 43 A.F.L. REV. 239 (1997).

[42] OMB CIR. A-76, *supra* note 1, at ¶ 4.a. In 1955, the Bureau of Budget issued a bulletin establishing the federal policy to buy goods and services from the private sector. Bureau of Budget Bulletin 55-4 (Jan. 1955) (cited in Diebold v. United States, 947 F.2d 787, 799 (6th Cir. 1991)). The OMB issued Circular A-76 in 1966, which restated this policy, but justified outsourcing for its cost-savings. The OMB revised the Circular in 1967, 1979, and 1983. OMB CIR. A-76, *supra* note 1, at ¶ 4.b. The OMB recognized that the private sector could not provide all goods and services. Therefore, it also carved out some exceptions. These exceptions include the unavailability of a commercial source, patient care, national defense interests, inherently governmental functions, time of war or military mobilization, and research and development. OMB Cir. A-76, *supra* note 1, at ¶ 8; SUPPLEMENT, *supra* note 10, at pt. I, ch.1, § C.

[43] *See* 10 U.S.C.A. §§ 2461-2469 (West 1998). Each statute addresses a different part of the DOD outsourcing process. A summary of each statute is as follows:

10 U.S.C.A. § 2460 (West 1998) (defining depot-level maintenance and repair).

10 U.S.C.A. § 2461 (West 1998) (requiring notice to Congress and a cost comparison study before converting any commercial activity with 20 or more DOD civilians to contract performance).

10 U.S.C.A. § 2462 (West 1998) (requiring the Secretary of Defense to purchase goods and services from the private sector if cheaper, but exempting goods and services that military or government personnel must perform).

10 U.S.C.A. § 2463 (West 1998) (requiring the Secretary of Defense to collect and maintain cost comparison data for the term of the contract or five years when converting a contractor-operated DOD commercial activity with 50 or more employees to DOD civilian employee performance).

10 U.S.C.A. § 2464 (West 1998) (requiring the Secretary of Defense to identify logistics capability DOD must have to ensure a ready and controlled source of technical competence and resources).

10 U.S.C.A § 2465 (West 1998) (prohibiting DOD from using appropriated funds to contract for firefighting or security guard functions at domestic bases, except as follows: overseas; on a government-owned

reference Circular A-76. The Circular A-76 process generally resembles other government contracting procedures, with one notable exception: the government also submits an offer. A snapshot of its procedures provide a backdrop for analyzing how best value contracting fits in this process. Often, an example illustrates concepts better than mere theory. Assume the following facts:[46]

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but privately operated installation; for services prior to 24 Sept. 1983; or for services with local governments at an installation closing within 180 days).

10 U.S.C.A. § 2466 (West 1998) (permitting DOD to use only 50 percent of funds to contract for depot-level maintenance and repair work).

10 U.S.C.A. § 2467 (West 1998) (requiring the Secretary of Defense to include any retirement costs in an A-76 cost comparison, and to consult with affected employees and their labor organizations).

10 U.S.C. § 2468 (1994) (authorizing DOD installation commanders to enter A-76 contracts for performing commercial activities until 30 Sept. 1995).

10 U.S.C.A. § 2469 (West 1998) (requiring the Secretary of Defense to use merit-based procedures when moving depot-level activities over $3 million to another DOD depot activity, and to use public-private competition when moving a depot level workload over $3 million to contractor performance).

10 U.S.C.A. § 2469a (West 1998) (establishing the procedures for converting depot-level maintenance and repair workload from DOD to the private sector on installations approved for closure or realignment under the Base Closure and Realignment Act of 1990).

See also Federal Workforce Restructuring Act of 1994, Pub. L. 103-226, 108 Stat. 111, 117 (1994) (requiring the President to ensure that buyouts or streamlining do not increase service contracts without a cost comparison); Government Performance and Results Act of 1993, Pub. L. 103-62, 107 Stat. 285 (1993) (requiring federal agencies to improve the confidence of the American people in government by focusing on government results, service, quality, and customer satisfaction).

[44] *See* U.S. DEP'T OF DEFENSE, DIR. 4100.15, COMMERCIAL ACTIVITIES PROGRAM (10 Mar. 1989); U.S. DEP'T OF DEFENSE, INSTR. 4100.33, COMMERCIAL ACTIVITIES PROGRAM PROCEDURES (9 Sept. 1985).

[45] *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 7.3 (Apr. 1, 1984) [hereinafter FAR]. The military departments have implemented Circular A-76 via commercial activity programs. *See,e.g.,* U.S. DEP'T OF THE AIR FORCE, SECRETARY OF THE AIR FORCE POLICY DIR. 38-6, OUTSOURCING AND PRIVATIZATION (1 Sept. 1997); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 38-203, COMMERCIAL ACTIVITIES PROGRAM (26 Apr. 94); U.S. DEP'T OF ARMY, REG. 5-20, COMMERCIAL ACTIVITIES PROGRAM (1 Oct. 1997); U.S. DEP'T OF ARMY, PAM. 5-20, COMMERCIAL ACTIVITIES STUDY GUIDE (17 Nov. 1992).

[46] This scenario resembles the facts in Madison Services, Inc., B-277614, Nov. 3, 1997, 1997 WL 704459 (C.G.). Beyond these facts, I do not presume to know how agency officials in Madison conducted the Circular A-76 competition. I have also built other assumptions into the BOS hypothetical. For example, the base officials used best value contracting, used a PWS, selected certain evaluation criteria, communicated with the MEO team, and kept the BOS functions in-house.

A military base has conducted a Circular A-76 competition. Using a Base Operating Services solicitation [hereinafter BOS],[47] base officials bundled[48] three functions together: civil engineering, transportation, and supply. Civil engineering encompassed family housing, lodging, grounds maintenance, and general operations. Supply encompassed the entire base supply system. Transportation encompassed vehicle maintenance and operations.

The Circular A-76 process began when DOD notified Congress of the Circular A-76 study for the BOS functions.[49] A local base team[50] then prepared a cost comparison[51] and developed several plans. These plans included the Performance Work Statement [hereinafter PWS],[52] the Quality Assurance Surveillance Plan,[53] and the Management Plan.[54] Together,

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[47] *See* AIR FORCE LOGISTICS MANAGEMENT AGENCY, U.S. DEP'T OF THE AIR FORCE, PROJECT NO. LC9608100, OUTSOURCING GUIDE FOR CONTRACTING 60-61 (1996) [hereinafter AFLMA OUTSOURCING GUIDE] (on file with the author). According to AFLMA, the Air Force has found that BOS contracts offer cost savings and efficiency. Specifically, BOS contracts use private sector expertise while saving money, and also reduce the number of overall contracts to a manageable level. When using a BOS contract, the Air Force typically "bundles" certain requirements together, such as supply, transportation, civil engineering, and services. It then appoints an in-house manager to administer the contract. *Id.* at 61.

[48] *See id.* at 59-60 "Bundling" occurs when an agency consolidates several functions into one contract, usually at one location. In DOD, numerous functions lend themselves to bundling, such as civil engineering, logistics, and services. Bundling presents two challenges, however. First, the installation must have the ability to manage a multi-function contract. Second, the installation must find a qualified source to perform multi-function tasks. When outsourcing, the installation should consider how bundling impacts small businesses and their resources to perform within a larger "umbrella" contract. The small businesses currently performing a function on a base may suffer if that function is bundled with others and then outsourced. AFLMA recommends including a subcontracting requirement in the solicitation when a small business is unavailable as a prime contractor. *Id.* at 59-60, 64.

[49] *See* 10 U.S.C.A. § 2461 (West 1998) (requiring notice to Congress and a cost comparison if 20 or more persons perform the function proposed for Circular A-76 study); 10 U.S.C.A. § 2467 (West 1998) (requiring DOD to consult with employees and their labor organizations after identifying a function for a cost comparison study).

[50] The Supplement refers to this team as the "Cost Comparison Study Team." It consists of agency experts in contracting, civilian personnel, management analysis, and the functional area under review. SUPPLEMENT, *supra* note 10, at pt. I, ch. 3, § B, ¶ 1. In this paper, the "Cost Comparison Study Team" is called the "MEO team." This phrase also refers to the employees in the MEO after it wins the hypothetical BOS competition.

[52] SUPPLEMENT, *supra* note 10, at pt. I, ch. 3, § C. The PWS defines the agency's needs, the performance standards and measures, and the timeframes for performance. The PWS also serves as the basis for all costs. The Supplement encourages a performance-based PWS. It refers agencies to Office of Federal Procurement

these plans formed the government's Most Efficient Organization [hereinafter MEO].[55] This "MEO" team also prepared a cost estimate of for the government's performance.[56] The contracting officer sealed the MEO and Management Plan until the base received bids or proposals.[57]

The contracting officer also selected best value as the procurement method[58] for the Circular A-76 BOS competition. Three private contractors submitted offers for the BOS

Policy Letter 91-2, Service Contracting, (9 Apr. 91); Office of Federal Procurement Policy Letter 93-1, Management Oversight of Service Contracting, (18 May 94); and Office of Federal Procurement Policy, Best Practices Guide to Performance-Based Service Contracting (Apr. 1996). *See* SUPPLEMENT, *supra* note 10, at pt. I, ch. 3, § C. The Supplement cautions that the PWS should not limit service options, arbitrarily increase risk, reduce competition, violate industry service norms, or omit statutory or regulatory requirements without full justification. After OMB published the Supplement in 1996, the Federal Acquisition Council issued final rules on performance-based service contracting. *See* FAC 97-01, 62 Fed. Reg. 44,813 (1997). These rules encourage contracting officers to use positive or negative performance incentives. To assist contracting officers and legal advisors, the Office of Federal Procurement Policy has placed several model performance-based performance work statements on the Internet. They are available at http://www.arnet.gov/. For a brief discussion of FAC 97-01, *see* ARMY LAW., Jan. 1998, at 94.

[53] SUPPLEMENT, *supra* note 10, at app. 1. The Quality Assurance Surveillance Plan QASP outlines how the federal employees will supervise the in-house or contract performance.

[54] *Id.* The Management Plan defines the organizational structure, operating procedures, equipment, and inspection plans for the MEO. The Management Plan also is the baseline document for the in-house cost estimate.

[55] *Id.* The MEO describes the way the Government will perform the commercial activity. The MEO is the basis for the Government's in-house estimate. It must reflect the scope of the PWS. It must also identify the organization structures for the MEO, including the staffing and operating procedures, equipment, and transition plans to ensure that MEO performs the in-house activity in a cost-effective manner.

[56] *Id.* at pt. II, ch. 2, § A. The MEO team prepares the government in-house estimate from the PWS. The MEO team then forwards the MEO to the Independent Review Officer for an audit. The in-house cost estimate includes the following items: personnel costs, material and supply costs, depreciation, capital costs, rent, maintenance and repair, utilities, insurance, travel, MEO subcontracts, overhead costs, and any additional costs. The agency calculates these costs using formulas in Part II of the Supplement.

[57] *Id.* at pt. I, ch. 3, § F. The Contracting Officer seals the MEO after the Independent Review Officer completes the audit.

[58] *Id.* at pt. I, ch. 3, § H. The Supplement permits all competitive methods under the Federal Acquisition Regulation. This includes sealed bid, two-step, source selection, and other competitive-procedures. Time restraints should guide this choice. Congress has limited DOD Circular A-76 studies to 24 months for a single function and 48 months for multiple functions. *See* Department of Defense Appropriation Act, 1998, Pub. L. No. 105-56, § 8027, 111 Stat. 1203, 1226 (1997).

contract. After receiving the private offers, a senior base official evaluated them and identified a local business as offering the "best value."[59] The same official also reviewed the MEO and decided it did not meet the same performance standards as the best value offer. After adjusting its offer and cost estimate, the MEO team resubmitted it for review.

Base officials then selected a winner. To win, a private offeror's cost estimate must be ten percent lower than that from the MEO team. Otherwise, the MEO team "wins" and the base keeps the function in-house.[60] For the BOS competition, the base-contracting officer compared the two cost estimates. Because the MEO team offered a lower cost, the base retained the BOS functions in-house.

After the cost comparison, the private offeror[61] appealed to the base for relief. After base officials denied its appeal, the private offeror is now seeking relief from either the

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[59] SUPPLEMENT, *supra* note 10, at pt. I, ch. 3, § G. If the agency chooses a negotiated procedure, the Supplement establishes guidelines to ensure equity in the cost comparison process. First, the government submits a Technical Performance Plan, like the commercial offerors. The Technical Performance Plan also reflects the MEO and is sealed prior to the decision authority considering any part of any contract offer. *Id.* at pt. I, ch. 3, § H, ¶ 3.a. Second, the agency establishes a Source Selection Authority (SSA). When establishing the SSA, the agency must ensure that its membership is free of any conflicts of interest. *Id.* at pt. I, ch. 3, § H, ¶ 3.b. The SSA reviews the contract offers and identifies the offer that represents the best overall value to the government. This offer competes with the Government's in-house cost estimate. *Id.* at pt. I, ch. 3, § H, ¶ 3.c. After selecting the competitive offer, the SSA evaluates the in-house offer and assesses whether or not it achieves the same level of performance. The SSA performs this review without viewing the in-house cost estimate. The government then adjusts the MEO to meet the performance standards accepted by the SSA. It submits a revised cost estimates to the Independent Review Officer to ensure that the revised in-house cost estimate meets the same scope of work and performance levels as the best value commercial offer. *Id.* at pt. I, ch. 3, § H, ¶ 3.e.

[60] SUPPLEMENT, *supra* note 10, at pt. II, ch. 4. The Supplement explains that the ten percent differential ensures "that the Government will not convert for marginal cost savings." *Id.*

[61] *Id.* at pt. I, ch. 3, § K. As an eligible appellant, the private offeror in the hypothetical BOS competition is an interested party. The term includes federal employees and contractors who submitted bids or offers. It also includes agencies that submitted formal offers to compete for the right to provide the service through an inter-service support agreement (ISSA).

Comptroller General or in federal court.[62] After a transition period, the MEO team began performing the BOS function.[63] After one year, base officials will review the MEO's performance to ensure it is performing the function in line with the PWS and the in-house estimate.[64]

B. The Process: Best Value Contracting[65]

From the snapshot of the Circular A-76 procedures, we know that an agency must select a procurement method when outsourcing.[66] Best value contracting is one choice. In the hypothetical BOS competition, base officials selected best value. What is best value and how does it work?

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[62] *Id.* If a party files an agency appeal, the Appeal Authority must decide within 30 days to either award the contract or cancel the solicitation. The Appeal Authority is an impartial official at a level organizationally higher than the official who made the original award decision.

[63] *Id.* at pt. I, ch. 3, § E, ¶ 4d. The Government's Management Plan contains a Transition Plan. The Transition Plan is designed to minimize any disruption, adverse impact, or start-up requirements when shifting work to or from in-house to contract.

[64] *Id.* at pt. I, ch. 3, § L. The agency must conduct a post-MEO performance review on not less than 20 percent of the functions the government performs resulting from a cost comparison. If this review reveals any in-house deficiencies, the agency should give the MEO personnel adequate time to correct them. If the MEO personnel fail to correct these deficiencies, or deviates from the PWS, the contracting officer has two options. If possible, the contracting officer must award the work to the next lowest offer that participated in the cost comparison. Otherwise, the contracting officer must immediately resolicit the cost comparison.

[65] For an overview of best value contracting, *see* Carl J. Peckinpaugh and Joseph M. Goldstein, *Best Value Source Selection: Contracting for Value, or Unfettered Agency Discretion?*, 22 PUB. CONT. L. J. 275 (Winter 1993).

[66] *See supra* note 58 and accompanying text.

Best value contracting stems from the Competition in Contracting Act of 1984 [CICA].[67] In negotiated procurements,[68] best value contracting permits an agency to evaluate cost and non-cost factors to select the offer providing the greatest overall value for the money.[69] In the solicitation, the agency must state every factor and subfactor and its "relative importance."[70] Additionally, it must always evaluate certain factors, such as cost or price,[71] the quality of the product or service,[72] and past performance.[73] The agency may also

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[67] 10 U.S.C. §§ 2301-2331 (1994).

[68] *See generally* RALPH C. NASH. JR. AND JOHN CIBINIC, JR., COMPETITIVE NEGOTIATION: THE SOURCE SELECTION PROCESS (1993). The negotiated procurement process evolves as follows: Once the agency has developed the PWS and the evaluation factors, it then solicits proposals from offerors. Upon receiving the offers, the contracting officer or the source selection evaluation team reviews them against the evaluation factors and subfactors. The contracting officer may then communicate with certain offerors to help determine the competitive range. After selecting the offerors who fall within the competitive range, the contracting officer conducts discussions. The contracting officer's overall purpose is to enhance the government's ability to obtain the best value from the procurement. During discussions, the contracting officer and the offeror address past performance and any weaknesses or deficiencies in the proposal. However, the contracting officer may not reveal another offeror's price, favor one offeror over another, or reveal an offeror's technical solution to another offeror. When the contracting officer has completed discussions, the offerors may submit a revised proposal. After conducting a tradeoff analysis, the Source Selection Authority then selects the offeror that represents the best value to the Government.

[69] FAR, *supra* note 45. When OMB published the Supplement, the FAR did not specifically define "best value." Rather, it stated that an agency should structure a negotiated procurement "to provide for the selection of the source whose proposal offers the greatest value to the Government in terms of performance, risk management, cost or price, and other factors." *See also supra* note 12 and accompanying text.

[70] FAR, *supra* note 45, at 15.304(d).

[71] *Id.* at 15.304(c)(1).

[72] *Id.* at 15.304(c)(2). When evaluating quality, the agency must consider one or more non-cost evaluation factor, such as past performance, technical excellence, management capability, personnel qualifications, and prior experience.

[73] *Id.* at 15.304(c)(3)(ii). According to the FAR, agencies must evaluate past performance in contracts expected to exceed $1 million. Effective 1 Jan. 1999, agencies must evaluate past performance for contracts expected to exceed $100,000. Prior to the FAR Part 15 rewrite, DOD authorized a deviation from similar provisions. One authority suggests this deviation still stands. ARMY LAW., Jan. 1998, at 27. *See generally* Sunita Subramanian, *The Implications of the FAR Rewrite for Meaningful Discussions of Past Performance*, 26 PUB. CONT. L. J. 445 (1997).

communicate with offerors on limited subjects.[74] Following any discussions, the agency selects a competitive range and allows certain offerors to submit revised proposals.[75]

Effective 1 January 1998,[76] the FAR defines "best value" as the "expected outcome of an acquisition that provides the greatest overall value for the agency."[77] To help agencies to select the offer with the "greatest overall value," the FAR creates a "best value continuum." On one end, cost factors may drive an agency's award decision.[78] The agency selects the lowest priced, technically acceptable offer as the best value.[79] On the other end, non-cost factors may drive the agency's award decision.[80] The agency may tradeoff cost and non-cost factors to select the best value offer, which is other than the lowest priced offer[81]

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[74] FAR, *supra* note 45, at 15.306(b); (d)(3); (e). The agency limits these discussions to offerors who have not responded to inquiries about adverse past performance and offerors whose competitive range status is uncertain. The agency may also communicate with an offeror to decide whether that offeror's proposal belongs in the competitive range. The agency may also award the contract without discussions if it notified the offerors of this fact in the solicitation. If so, the agency may only allow the offeror to resolve minor or clerical errors, or clarify certain parts of the proposal, such as past performance. *Id.* at 15.306(a)(1)-(3).

[75] FAR, *supra* note 45, at 15.307(b). Formerly known as "best and final offers," the FAR Part 15 rewrite now refers to them as "revised proposals."

[76] On 30 September 1997, the Civilian Agency Acquisition Council and the Defense Acquisition Regulation Council issued Federal Acquisition Circular (FAC) 97-02, which revised Part 15 of the FAR and made conforming changes to other parts of the FAR. Although effective on 10 October 1997, FAC 97-02 allowed agencies to delay implementing the FAR Part 15 changes until 1 Jan. 1998. *See* Final Rules, *supra* note 12.

[77] *See* FAR, *supra* note 45, at 2.101. This section defines "best value" as follows: "Best value means the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement."

[78] *Id.* at 15.101.

[79] *Id.* at 15.101-2(a). This section further states that "solicitations shall specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors." *Id.* at 15.101-2(b)(1).

[80] *Id.* at 15.101.

[81] *Id.* at 15.101-1(a). This section requires the agency to state in the solicitation all evaluation factors and subfactors and their relative importance to each other. It also requires the agency to state whether the non-cost factors are "significantly more important than, approximately equal to, or significantly less important than cost or price." *Id.* at 15.101-1(b)(1)-(2).

From policy to process, outsourcing promises to save money. Does "best value" skew this promise? What issues does it raise when mixed with Circular A-76?

IV. The Process in Action: Selected Issues in Circular A-76

When using Circular A-76 and best value, an agency will handle several issues, three of which are as follows: selecting evaluation factors; evaluating past performance; and conducting discussions. Moreover, an agency must also decide whether a function is "inherently governmental."[82]

A. Selected Issues: Inherently Governmental Functions

In the hypothetical BOS competition, base officials competed the civil engineering, transportation, and supply functions. How did the base officials decide they could compete these functions? The answer depends on whether a function is inherently governmental. The

[82] Conflict of interest questions may also arise during a Circular A-76 competition, especially as they impact employees. In this area, a legal advisor offers invaluable guidance and should consider several issues. For example, employees preparing the MEO or developing the PWS have access to procurement sensitive data. The Procurement Integrity Act forbids them from disclosing or obtaining "contractor bid or proposal information" and "source selection information." 41 U.S.C.A. § 423(a)-(b) (West 1998). Employees who participate "personally and substantially" in preparing the PWS must also report employment contacts from bidders or offerors under 41 U.S.C.A. § 423(c) (West 1998). Some employees may not accept jobs with the winning bidder or offeror under 41 U.S.C.A. § 423(d) (West 1998). This ban applies is the procurement exceeded $10 million and the employee held certain jobs or roles, such as source selection authority or contracting officer. Employees working on the MEO or PWS may also run afoul of the conflict of interest bans of 18 U.S.C. § 208 (1994). For example, an employee offered a job from a bidder must either reject the offer or disqualify himself from the Circular a-76 process. Finally, an employee who may accept a job from a winning bidder must avoid the "side-switching" ban in 18 U.S.C. § 207. Throughout the Circular A-76 process, the legal advisor should also consider how these statutes affect an employee's right of first refusal for employment with a winning bidder under FAR 7.305(c). Finally, the legal advisor should consult the Office of Government Ethics regulations and the Joint Ethics Regulation. *See* Standards of Conduct for the Executive Branch, 5. C.F.R. § 2635 (1998); U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993).

OMB has exempted inherently governmental functions from Circular A-76 because they are "so intimately related to the exercise of the public interest as to mandate performance by Federal employees."[83]

When analyzing this issue,[84] agency officials may rely on policy guidance. Office of Federal Procurement Policy Letter 92-1 outlines the scope of inherently governmental

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[83] OMB CIR. A-76, *supra* note 1, at ¶ 6.e. *See also* SUPPLEMENT, *supra* note 10, at pt. I, ch.1, § B.

[84] Labeling a function "inherently governmental" is a prickly issue for DOD agencies. The term is slippery and agencies have wide discretion. Outsourcing military legal services illustrates the vexing nature of this issue. Some military legal functions are inherently governmental, such as prosecuting courts-martial. Military attorneys interpret and execute laws in a criminal proceeding by exercising discretion and making decisions for the government. Military attorneys must perform these roles, not contractors.

Other legal services may lend themselves to outsourcing, such as legal assistance. On the installation, the military service arguably could contract out legal assistance. Contractors may provide both the ministerial and legal counseling judge advocates currently perform. These tasks include preparing documents (especially wills and powers of attorney), one-on-one counseling, and legal negotiations. Off the installation, however, legal assistance becomes more of an inherently governmental function. Judge advocates can offer immediate legal assistance to troops in a deployed environment. Conversely, the unit may not as easily deploy contract attorneys to meet the immediate needs of the troops. Moreover, contract attorneys for legal assistance present a special problem: working against their own financial interests. Usually, a successful preventive law program educates troops before they need an attorney. A contract legal assistance attorney lightens his wallet if he decreases this demand.

The role of the acquisition attorney raises similar issues. A typical acquisition attorney reviews contracts and documents for legal sufficiency; renders advice; attends meetings; and offers litigation support for bid protests, contract claims, or other legal proceedings. These tasks do not always require the acquisition attorney to exercise discretion. Of course, the same attorney who reviews a contract file for legal sufficiency may also advise a source selection panel. In this role, the acquisition attorney may exercise discretion or provide advice directly related to the contract award decision. This blurs the role between reviewing a contract file and advising a source selection authority. It also creates additional administrative problems. The supervising attorney in the office must ensure that the contractor does not participate in reviews or actions that conflict with his or her employment contract. Other questions arise. For example, does the legal office use some attorneys only for routine legal reviews and advice, while using other attorneys for the complex contracts? If so, the Staff Judge Advocate may need more manpower, which defeats the cost savings goal of outsourcing.

An even more immediate issue centers on how much legal support the military should outsource. At a military base, the Staff Judge Advocate plays an inherently governmental role. Does the military service then outsource the other base-level attorneys? Or, does the military service designate the Major Command Staff Judge Advocate as inherently governmental and outsource all subordinate base level legal services? Either option presents an alarming problem. How does each military service train future Staff Judge Advocates from the current pool of company grade officers if contract attorneys perform military legal services? Recently, the Navy General Counsel has opined that the Navy Office of General Counsel provides an inherently governmental function that only federal employees can perform. *See* Memorandum, General Counsel of the Navy, to Principal Deputy General Counsel, Deputy General Counsel, Associate General Counsel, Assistant General Counsel, and Command Counsel, subject: Out-Sourcing Legal Services (9 July 1997) (on file with the author).

functions, defining them as activities requiring a federal employee to exercise discretion or make value judgments for the government.[85] The Policy Letter distinguishes between discretionary and "value" judgments, and ministerial acts. It encourages agencies to consider

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One other thought: contractors are already on the battlefield. In Bosnia, the Army used the Logistics Civil Augmentation Program [hereinafter LOGCAP] contract to provide logistics support. The LOGCAP contractor, Brown and Root Services Corporation, provided services in civil engineering, environmental support, maintenance, and cargo handling. The General Accounting Office found that the LOGCAP contractor "performed well," despite some financial and oversight problems. GENERAL ACCOUNTING OFFICE, CONTINGENCY OPERATIONS: OPPORTUNITIES TO IMPROVE THE LOGISTICS CIVIL AUGMENTATION PROGRAM, Report No. GAO/NSIAD-97-63 (Feb. 11, 1997). *See also* COLONEL DAVID L. CARR, U.S. DEP'T OF ARMY ENVIRONMENTAL POLICY INSTITUTE, WHITE PAPER AEPI-IFP-197, CONSIDERATIONS FOR THE DEVELOPMENT OF A DOD ENVIRONMENTAL POLICY FOR OPERATIONS OTHER THAN WAR 29 (1997). If the Army uses logistics contractors on the battlefield, may it (or any other branch of the military) also use contract attorneys on the battlefield?

Congress has also struggled with slippery definition of "inherently governmental." Noting that DOD lacked a "clear definition" of inherently governmental functions, Congress has directed it to propose a DOD-wide definition. The HNSC has expressed concern that each military department defines differently "inherently governmental functions" and "commercial activities." It criticized the Air Force after it redefined nearly 194,000 personnel from the commercial activity category to the inherently governmental category between Fiscal Years 1994 and 1996 without changing their role or mission. By 1 Mar. 1998, the HNSC directed DOD to prepare a report addressing inherently governmental functions. It directed DOD to propose a way to uniformly define this term. It also directed DOD to list all functions it considers "inherently governmental" and why. The HNSC also ordered the Air Force to prepare a separate report explaining why it shifted personnel from the commercial to the inherently governmental category. H.R. REP. NO. 105-132, at 296 (1997).

[85] Policy Letter on Inherently Governmental Functions, (Sept. 23, 1992). *reprinted in* SUPPLEMENT, *supra* note 10, at app. 5. The policy letter further states:

> Governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of Government authority, and (2) monetary transactions and entitlement.
> An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to:
>
> (a) bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;
> (b) determine, protect, and advance its economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;
> (c) significantly affect the life, liberty, or property of private persons;
> (d) commission, appoint, direct, or control officers or employees of the United States; or
> (e) exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of appropriated and other Federal funds.
>
> Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials. They also do not include functions that are primarily ministerial and internal in nature....

Id. at app.5, ¶ 5.

whether an agency official uses discretion to commit the agency to a course of action.[86] For example, does the employee make hiring or purchasing decisions? Or does the employee only performed assigned tasks? Appendix A to Policy Letter 92-1 also lists examples of inherently governmental functions that DOD may not outsource. These include conducting criminal investigations; controlling prosecutions; managing and directing the military; and commanding military forces in a combat, combat support, or combat service support role.[87] Likewise, Circular A-76 and its Supplement list examples of commercial activities that DOD may outsource,[88] absent a Congressional bar.[89]

The hypothetical BOS competition illustrates how an agency may decide whether a function is inherently governmental. Base officials did not label the civil engineering, transportation, and supply functions as inherently governmental, but labeled them

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[86] *Id.* at app. 5, ¶ 7(a).

[87] *Id.* at app. 5, app. A.

[88] *See* OMB CIR. A-76, *supra* note 1, at attach. A; SUPPLEMENT, *supra* note 10, at app. 2. *See also supra* note 4 and accompanying text.

[89] *See, e.g.*, 10 U.S.C.A. § 2465 (West 1998). This statute prohibits DOD from using appropriated funds to contract for firefighting or security guard functions at domestic bases. The statute only permits contracting for these functions if the contract is performed overseas; on a government-owned but privately operated installation; existed prior to 24 Sept. 1983; or is for services with a local government at an installation closing within 180 days. Congress enacted this statute to allay concerns about the reliability of private firefighting and security services; control over contractor personnel; and the contractor's right to strike. The General Accounting Office has reviewed whether DOD should contract out these services. DOD believes it could save money by competing these services. After reviewing active contracts, the GAO found mixed results. Though some bases rated the firefighters and security personnel as "outstanding," other bases had contractors who went bankrupt or failed to perform. Despite 10 U.S.C.A. § 2465 (West 1998), the GAO recommended that bases wanting to compete these services conduct a cost comparison study to see if they actually will reap any cost savings. GENERAL ACCOUNTING OFFICE, BASE OPERATIONS: CONTRACTING FOR FIREFIGHTERS AND SECURITY GUARDS, Report No. GAO/NSIAD-97-200BR (Sept. 12, 1997). The HNSC, however, expressed concern that repealing 10 U.S.C.A. § 2465 would seriously impact national security. It directed the Secretary of Defense to identify those firefighting and guard functions that are inherently governmental and propose a plan to outsource these functions should Congress repeal the current prohibition. H.R. REP. NO. 105-132, at 293-294 (1997).

commercial functions subject to Circular A-76. How did Circular A-76, the Supplement, and Policy Letter 92-1 guide this choice?

Using Policy Letter 92-1, base officials distinguished between an employee's discretionary or ministerial roles. Suppose an employee at the base approved purchasing new lawnmowers for the installation. The employee has committed the base to a course of action and has spent money. Thus, the employee has exercised discretion, an inherently governmental act, and the base may not compete this function in the BOS competition. Suppose, however, the employee only cut the grass. The employee has performed a ministerial act, one that is not inherently governmental. The base may compete this function. Moreover, Appendix B to the Supplement offers guidance, specifically listing a multi-function contract as a commercial activity.[90] The Supplement also lists the BOS functions (civil engineering, transportation, and supply) as commercial activities under the heading "installation services." and "maintenance, repair, alteration, and minor construction of real property."[91]

Even though base officials labeled the BOS functions commercial activities, they must perform one last review: ensuring no Congressional statutes bar DOD from outsourcing the BOS functions. Absent such statutes, base officials may continue with the Circular A-76 BOS competition.[92]

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[90] SUPPLEMENT, *supra* note 10, at app. 2.

[91] *Id.*

[92] *See e.g., supra* note 89 and accompanying text. *See also* 10 U.S.C.A. § 2464 (West 1998) and 10 U.S.C.A.

B. Selected Issues: Evaluation Factors

In the hypothetical BOS competition, base officials used the best value procurement method. Best value contracting may allow an agency to better meet its needs in certain procurements. The issue becomes: does best value contracting allow an agency to meet its needs in a Circular A-76 cost comparison?

To meet its needs, an agency must have well-defined evaluation factors and a well-defined PWS. The PWS is the heart of a Circular A-76 competition.[93] It captures the workload and defines the requirements. Unlike a statement of work, a PWS does not tell the contractor or the MEO team how to perform a task. Rather, the PWS must allow the agency to determine if either acceptably performed the work. Suppose the BOS solicitation contained a requirement for grounds maintenance, specifically grass cutting. Using a statement of work, base officials would have defined the grass cutting requirement for the offerors, and would have also told them how and when to cut the grass. For example, a

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§ 2466 (West 1998). 10 U.S.C. § 2464 prohibits DOD from using Circular A-76 for logistic capability absent a waiver from the Secretary of Defense.10 U.S.C. § 2466 permits DOD to use only 50 percent of its funds to contract for depot-level maintenance and repair work.

[93] On 22 August 1997, the FAR Council issued new rules on performance-based service contracting. *See* FAC 97-01, 62 Fed. Reg. 44,813 (1997). These final rules amend the FAR to implement the Office of Federal Procurement Policy Letter 91-2, Service Contracting. This policy letter prescribes policies and procedures for performance-based contracting methods. *See* Policy Letter on Service Contracting, 56 Fed. Reg. 15,110 (Apr. 15, 1991). Performance-based contracting methods ensure that the agency receives and the contractor achieves performance quality levels, and the total cost relates to how the contractor meets the performance standards. FAR, *supra* note 45, at 37.601. The key to performance-based contracting methods is the PWS. It must define the requirements in "clear, concise language identifying specific work to be accomplished." FAR, *supra* note 45, at 37.602-1. When preparing a PWS, agency officials "shall, to the maximum extent practicable" describe the work by what tasks the contractor should accomplish, rather than how it would accomplish those tasks. The PWS should also use measurable performance standards and financial incentives to encourage competitors to develop innovative and cost-effective methods for performing the work. FAR, *supra* note 45, at 37.602-1(b)(1)-(4). The new rules also require agencies to use competitive negotiations "when appropriate to ensure selection of services that offer the best value to the Government, cost and other factors considered." FAR, *supra* note 45, at 37.602-3.

statement of work might have defined for the offeror what type of equipment to use when cutting the grass, how short to cut the grass, how often to cut the grass, and when to fertilize the grass. Using a carefully drafted PWS, however, bases officials only defined the grass-cutting requirement. It let the offerors decide how to propose the details of how and when to cut the grass to meet the performance standard.[94]

Well-defined evaluation criteria are equally important.[95] In the solicitation, agency officials may weigh each factor equally or weigh them differently.[96] For the BOS competition, base officials evaluated three factors: the offeror's technical capability, past performance, and price. Technical capability requires the offeror to understand the mission and staff each function with skilled personnel to perform the numerous technical tasks. Past performance gauges the offeror's track record for quality, responsiveness, and timeliness. The offeror's price also must be realistic and complete in light of the technical proposals.

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[94] AFLMA OUTSOURCING GUIDE, *supra* note 47, at 29.

[95] *See* NASH AND CIBINIC, *supra* note 68, at 211-12. The agency has three options when drafting the evaluation factors for the base operating services contract. First, if technical and other factors outweigh cost, the evaluation factors must still state that the Government will not award to the higher cost offeror for only slightly superior technical or other factors. Second, if the agency weighs cost and technical factors equally, the evaluation factors should recite that the Government's goal is to achieve a balance between these factors. Finally, if cost outweighs technical or other factors, the evaluation factors should state that the Government will not award to the lowest cost offeror for inferior technical or other factors. The AFLMA suggests the following language in a Circular A-76 best value procurement for base operating services:

> The services to be performed under any contract resulting from this solicitation are highly technical and essential to the Air Force mission. THEREFORE, TECHNICAL CAPABILITY IS MORE IMPORTANT THAN PRICE. THE LOWEST PRICED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. LIKEWISE, THE HIGHEST TECHNICALLY RATED PROPOSAL MAY NOT NECESSARILY RECEIVE THE AWARD. FINAL SELECTION IS BASED ON THE PROPOSAL WHICH IS MOST ADVANTAGEOUS TO THE GOVERNMENT.

AFLMA OUTSOURCING GUIDE, *supra* note 47, at app. 4.

[96] *See supra* note 81 and accompanying text.

Recall that base officials selected the MEO team to perform the BOS functions because it prepared a lower cost estimate than the private offeror. Yet base officials evaluated the private offeror on cost and other non-cost factors. This discrepancy highlights the tension between best value and Circular A-76. Both have different goals. By using best value, base officials evaluated the overall quality of the offeror's performance, including cost. With Circular A-76, base officials evaluated the overall cost of the MEO team's performance. When used together, could base officials reconcile the two? The answer is no; Circular A-76 forced base officials to ultimately focus on cost when selecting a "winner," giving them "best value" on a budget.

Second, the BOS solicitation highlights a "gaming" issue. The losing offeror may accuse the agency of deliberately inflating the evaluation factors to exceed its minimum needs. The motive: to favor the MEO and keep the function in-house. In this scenario, the evaluation factors and the PWS clash with Circular A-76. A budget-driven document, the PWS must state only the agency's minimum needs. This presents an interesting issue. Doesn't best value contracting always exceed an agency's minimum needs? Doesn't it allow an agency to ask the private offeror to propose a "Cadillac" when it may only afford a "Volkswagen"? The cost-savings goal of Circular A-76 drives the answer to these questions. Suppose an offeror submitted a highly rated technical proposal for the BOS solicitation that met the minimum needs for the base. In fact, the offeror proposed an innovative, fast way to automate entire supply system to track inventory. Base officials rated the proposal highly and selected it as the "best value" offer. However, the MEO team offered a lower cost and the base kept the function in-house. The offeror may argue that the base deliberately rated

the technical factor higher than cost, knowing that any best value offer would lose to the MEO on cost.[97] Is this fair? To the disgruntled offeror, probably not. Fair or not, the Circular A-76 process protects an agency if it followed the rules. The offeror will prevail before the Comptroller General only if it shows that base officials conducted a faulty or misleading cost comparison, failed to act in good faith, or failed to follow the Circular A-76 "ground rules."[98]

From the previous two issues comes the final, and most difficult issue: encouraging private offerors to submit quality best value proposals, knowing that Circular A-76 is a cost-driven process. In the hypothetical BOS competition, the offeror spent money and time preparing an innovative proposal that met the best value criteria. When base officials selected the MEO because it offered a lower cost, the losing offeror might take one of three approaches in the future. It could still prepare a superior proposal that meets the best value criteria and the agency's minimum needs, hoping to beat the MEO on cost. It could also prepare an average proposal that competes with the MEO on cost. Finally, it could choose not to even submit a proposal. If Circular A-76 drives away private contractors, who wins? The agency loses because when cost drives its award decision, cost might not always yield a

[97] By exposing this "gaming" issue, I only intend to show a flaw in the Circular A-76 process, not to suggest that agency officials would deliberately "game" the competition to favor the MEO. In my experience, DOD officials working Circular A-76 issues strive to level the playing field for both sides. Nevertheless, the Circular A-76 process inherently favors the agency.

[98] *See, e.g.*, Madison Services, Inc., B-277614, 1997 WL 704459 (C.G.) (finding cost comparison neither faulty nor misleading and agency personnel acted in good faith); Crown Healthcare Laundry Services, Inc., B-270827, B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207 (limiting scope of review to determining if agency conducted a faulty or misleading cost comparison).

"best value." The private offeror loses when it spends time and money only to fall short to the MEO team.[99]

C. Selected Issues: Past Performance

In the hypothetical BOS competition, base officials did not evaluate the past performance of the MEO team. Yet, the FAR required them to evaluate a private offeror's past performance.[100] A critical factor, past performance is a good barometer of an offeror's future contract performance.[101] How may an agency gather past performance data? May an agency ever evaluate the past performance of the MEO team?

When reviewing past performance, an agency must allow private offerors to identify past or current contracts for similar efforts. It must also allow offerors to explain any problems they encountered with other contracts, plus corrective actions.[102] With this past

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[99] Despite these issues, may a DOD agency still receive a "best value" in a Circular A-76 competition? Perhaps, but within budget constraints. To receive an outstanding product or service, DOD personnel must carefully draft the evaluation factors and the PWS. Sensible evaluation factors and a clear PWS encourages offerors to propose unique, cost-effective ways to meet DOD's needs.

[100] FAR, *supra* note 45, at 15.304(c)(3)(i). This applies to all competitive negotiations expected to exceed $1 million. After 1 Jan. 1999, agencies must evaluate past performance for all acquisitions expected to exceed $100,000. The FAR encourages agencies to develop phase-in schedules. *Id.* at 15.301(c)(3)(ii).

[101] *See, e.g.,* Rotair Indus., Inc., B-276435.2, July 15, 1997, 97-2 CPD ¶ 17; Int'l Bus. Sys., Inc., B-275554, March 3, 1997, 97-1 CPD ¶ 114.

[102] FAR, *supra* note 45, at 15.305(2)(ii). For an offeror without a record of relevant past performance, or for whom past performance information is unavailable, the agency gives the offeror a neutral rating on this factor. *Id.* at 15.305(2)(iv). In a Circular A-76 competition, this raises an interesting issue: does a neutral rating hurt or help a private offeror when the agency does not evaluate the MEO's past performance? A neutral rating arguably hurts the private offeror because this is one area where it could have offered a "best value." Even though the agency gives the offeror a neutral rating, it might still view the lack of past performance as a moderate risk. Conversely, a neutral rating arguably helps the private offeror because it levels the playing field. The agency does not evaluate the past performance of either the private offeror or the MEO.

performance data, base officials evaluated offers in the hypothetical BOS competition. It permitted them to scrutinize how well an offeror and its employees performed as a prime and subcontractor. Past performance also led base officials into other areas of an offeror's past performance. For example, has the offeror previously performed a BOS contract? Did the offeror meet contract requirements? Did it meet performance schedules? How well did it manage costs? What feedback did it receive from its customer, the end user? Acquiring the names and resumes of the offeror's key personnel would further verify their experience and availability to perform the contract tasks.[103]

When an agency only evaluates the private offeror's past performance, does this favor the MEO? Some argue that it does.[104] How may agencies avoid bias?[105] Unless OMB

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[103] *See* AFLMA OUTSOURCING GUIDE, *supra* note 47, at app. 4.

[104] Some members of Congress agree that the Circular A-76 process favors the Government. Senate and House members have introduced a bill requiring the federal government procure all goods and services from the private sector necessary to operate the government. *See* S. 314/H.R. 716, 105th Cong. (1997). Known as the Freedom from Government Competition Act, this bill would prohibit agencies from providing or obtaining goods or services from other agencies unless the goods or services are inherently governmental, dictated by national security, or the federal government is the best value for the goods or services. Regarding best value, the bill would require the OMB to write regulations to consider cost, qualifications, past performance, technical capability, and other relevant non-cost factors for both the public and private sector.

Testimony supporting the bill offer three reasons why outsourcing should, but does not, always provide the best value. First, the Circular A-76 procedures fail to account for a comprehensive and realistic cost comparison. Second, certain statutes still require DOD to base outsourcing decisions on the lowest cost. *See* 10 U.S.C.A. §§ 2461-2462 (West 1998). Although Circular A-76 encourages "best value," these statutes make that assessment specious. The DOD evaluates the in-house offer only for cost, but evaluates the private sector offer on cost and other factors. This fails to equally account for non-cost factors and circumvents best value. The proposed legislation would amend these statutes to refer to "best value" rather than lowest cost. Third, some subordinate commands within the Department of Defense do not support outsourcing and either ignore or subvert the process. Proponents of the legislation recommended Congress entice DOD to take advantage of outsourcing with incentives, such as keeping part of the money it saves from outsourcing. *See Privatization and Outsourcing DOD Reform Initiatives: Hearings on H.R. 716 Before the Subcomm. on Readiness of the Comm. on National Security*, 105th Cong. (1997) (statement of Gary D. Engebretson, President, Contract Services of America), *available in* 1997 WL 8220135.

[105] This raises an interesting question: If an agency could evaluate the MEO's past performance, how would it do so? Would it evaluate the employees in the MEO currently performing the functions? Would this be meaningful if the agency must implement a reduction-in-force [hereinafter RIF], where employees have bump and retreat rights? If so, the agency may have to staff the MEO with different personnel. Would the personnel

amends Circular A-76, agencies may only consider a MEO's cost estimate. However, the Supplement to Circular A-76 allows an agency to evaluate a MEO's performance after one year if it kept the function in-house.[106] In the hypothetical BOS competition, base officials must evaluate the MEO personnel to see if they have performed the work within the PWS and the cost estimate. They must give the MEO team a chance to correct any problems. If the MEO team fails to correct these problems, base officials must award the work to the next lowest offeror or re-compete the functions. Though not ideal, this belated review of the MEO's performance protects the integrity of the Circular A-76 cost comparison process.

D. Selected Issues: The Scope of Discussions

In the hypothetical BOS competition, base officials selected a "best value" offeror, but concluded that the MEO could not meet the same performance standards. In a Circular A-76 competition, agency officials may discuss with the MEO team their deficient offer if it fails to meet the same performance standards and scope of work as the private offer. However, they must avoid technical leveling and technical transfusion.

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in the "new" MEO" perform the functions as efficiently as the personnel in the original MEO? Second, the agency must decide what to evaluate. Unlike the private offeror, the MEO does not have prior contracts for the agency to review. There are alternatives, however. For example, the MEO might have won current performance-related awards that indicate its probable future performance. An agency could also review the MEO's quality assurance reports or other inspections for positive and negative data about the MEO. Finally, DOD's emphasis on "total quality management" provides yet another source of data about the MEO. For example, the Air Force conducts "Quality Air Force Assessments" [hereinafter QAFAs]. In a QAFA, the Major Command assesses an installation in several performance-related areas. These areas include leadership, customer service, customer feedback, unit goals, and how it measures progress towards those goals. Within a wing, each squadron, staff office, and flight will generate data on these and other areas. In a Circular A-76 competition, perhaps the DOD agency could direct the MEO personnel to provide this data to assess the MEO's past performance.

[106] *See supra* note 64 and accompanying text.

Prior to the rewrite of FAR Part 15, the FAR defined technical leveling as "helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal."[107] The FAR defined technical transfusion as disclosing technical information about a proposal to improve a competing proposal.[108] The revised FAR Part 15 does not use the terms "technical leveling" or "technical transfusion," but retains the concept. FAR 15.306(e) prohibits agency officials from favoring one offeror over another, revealing an offeror's technology, revealing an offeror's price without permission, revealing the names of persons providing past performance data, or revealing source selection information.[109]

Does Circular A-76 invite technical leveling and technical transfusion? That danger exists when agency officials communicate with the MEO team as they adjust performance standards. Officials risk tainting the entire Circular A-76 process if they disclose to the MEO team the technical, cost, or past performance data from the best value offer. After all, the offeror has spent time and money figuring out how to meet the agency's needs. If agency officials disclose the offeror's approach, ideas, or cost to the MEO team, it arms them with an unfair advantage. The MEO team may adjust the in-house offer to perform the function at a lower cost than the private offeror. The result: the offeror provides a free consulting

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[107] FAR, *supra* note 45, at 15.610(d). For an overview of technical leveling, *see* Steven W. Feldman, *Traversing the Tightrope between Meaningful Discussions and Improper Practice in Negotiated Federal Acquisitions: Technical Transfusions, Technical Leveling, and Auction Techniques,* 17 PUB. CONT. L.J. 211, 238-246 (1987) [hereinafter Feldman].

[108] FAR, supra note 45 at 15.610(e)(1). *See also* Feldman, *supra* note 107, at 227-238.

[109] FAR, *supra* note 45 at 15.306(e). *See also* Policy Letter on Service Contracting, *supra* note 93.

service to the agency. The impact: the offeror loses any incentive to propose innovative ideas or a higher level of performance in future Circular A-76 competitions.

How may agency officials avoid technical leveling or transfusion when communicating with the MEO team? They may look to case law and statutes for guidance. The Comptroller General has ruled that agency officials may generally lead offerors into deficient areas of their proposal. For example, in *Simmonds Precision Products, Inc.*, the Comptroller General ruled that the Air Force properly asked other offerors during discussions if they considered alternate approaches to the design standards in the solicitation.[110] The Comptroller General concluded that the Air Force did not reveal another offeror's unique design or approach. However, an agency improperly revealed an offeror's unique data in *Litton Systems, Inc.*[111] In that case, the agency disclosed another offeror's source selection information to the awardee. The awardee used this data to improve its offer. The Comptroller General ruled that the agency improperly disclosed protected data to the awardee, giving it an unfair advantage.

A more recent case depicts how an easily an agency may gain access to and use a private offeror's cost estimate in a Circular A-76 competition. In *Madison Services, Inc.*,[112]

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[110] *See* Simmonds Precision Prod., Inc., B-244559.3, June 23, 1993, 93-1 CPD ¶ 483 (finding agency properly informed other offerors that solicitation contemplated an alternate approach without suggesting a certain design or another offeror's proposal).

[111] *See* Litton Sys., Inc., B-234060, May 12, 1989, 89-1 CPD ¶ 450 (finding agency tainted the procurement process when it disclosed the competitor's source selection sensitive information to the awardee, thus giving the awardee an unfair competitive advantage about the competitor's product).

[112] Madison Services, Inc., B-277614, Nov. 3, 1997, 1997 WL 704459 (C.G.). In Madison, the Air Force used best value contracting procedures. It evaluated technical and price factors to determine which offer or combination of offers gave the Air Force the "best value."

the Air Force solicited offers for a base operating services contract. After performing the Circular A-76 cost comparison study, the Air Force kept the functions in-house because the MEO offered a lower cost. Madison filed an agency appeal. Both local officials and Major Command officials upwardly adjusted the in-house cost estimate during the review process. However, the Air Force denied Madison's appeal. Madison protested to the Comptroller General.

Madison alleged that base personnel who prepared the in-house cost estimate "gamed" the procurement by deliberately omitting some costs from the initial in-house estimate. According to Madison, base personnel omitted these costs so they could review its proposed costs before recalculating the in-house estimate during the appeal process.[113] Madison also alleged that the appeal process favored the MEO. According to Madison, the appeal review team discussed the omitted costs with the base employees who initially prepared the in-house cost estimate to ensure that estimate prevailed.[114]

The Comptroller General ruled that the Air Force did not "game" the Circular A-76 cost comparison. The Comptroller General found that Madison failed to show bad faith and excused the base personnel for mistakenly omitting costs from the in-house estimate. The Comptroller General noted that the confusing language in the cost comparison and solicitation made it difficult for the base personnel to accurately calculate the in-house cost

[113] Madison Services, Inc., 1997 WL 704459, at * 3-4.

[114] Madison Services, Inc., 1997 WL 704459, at * 4.

estimate.[115] Moreover, the Comptroller General ruled that the appeal review team properly consulted with the base personnel who prepared the in-house estimate. Only those personnel could logically find the omitted costs and properly recalculate the in-house cost estimate.[116] Finally, the Comptroller General observed that the base officials Air Force significantly increased the in-house cost estimate after they reviewed Madison's costs, an act inconsistent with agency bias.[117]

Although the Comptroller General exonerated the Air Force, this case illustrates pitfalls in the Circular A-76 process. It exposes how agency personnel have ready access to an offeror's cost estimate during discussions.[118] After reviewing Madison's cost estimate, the appeal review team upwardly adjusted the in-house cost estimate. However, it kept the in-house estimate lower than Madison's. Although base officials in *Madison* acted in good faith, might agency officials at another time and place might be tempted to act otherwise? This smacks of gaming, with the agency potentially giving the MEO team an unfair advantage. It also shows how cost controls the Circular A-76 award, even when the agency uses best value procedures.

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[115] Madison Services, Inc., 1997 WL 704459, at *5.

[116] Madison Services, Inc., 1997 WL 704459, at * 6.

[117] Madison Services, Inc., 1997 WL 704459, at * 6.

[118] The Comptroller General observed that the agency held two rounds of discussions with the private offerors and twice allowed them to revise their proposals. However, it did not discuss the MEO or the in-house cost estimate with the MEO personnel. Madison Services, Inc., 1997 W.L. 704459, at * 4. The point: an agency may also communicate with a private offeror in a Circular A-76 competition.

Finally, two statutes protect a private offeror during the Circular A-76 process. First, the Procurement Integrity Act prohibits DOD officials from disclosing or obtaining contractor bid, proposal, or source selection information.[119] The Trade Secrets Act prohibits agency officials from disclosing the private offeror's proprietary data.[120] It forbids officials from disclosing "practically any commercial or financial data collected by any federal employee from any source."[121]

What guidelines do these cases and statutes offer to assist agency officials avoid technical leveling and technical transfusion? In the hypothetical BOS solicitation, suppose that a private offeror proposed an innovative way to automate the supply system. The MEO

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[119] Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 93-400, § 27, 102 Stat. 4063, *as amended by* the Clinger-Cohen Act, Pub. L. No. 104-106, §§ 4001-4402, 110 Stat. 186, 659-665 (1996) (codified as amended at 41 U.S.C.A. § 423 (West 1998)). *See also* FAR, *supra* note 45, at 3.104 (implements the Procurement Integrity Act). The Procurement Integrity Act prohibits the following persons from knowingly disclosing contractor bid or proposal information or source selection information before contract award:

> [A]ny person who--
> (i) Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a federal agency procurement; and
> (ii) By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information.

FAR, *supra* note 45, at 3.104-4(a)(2). "Contractor bid or proposal information" includes cost or pricing data; indirect costs or labor rates; and information the offeror has marked as proprietary. *Id.* at 3.104-3. "Source selection information" includes bid prices; proposed costs or prices in a negotiated procurement; source selection plans; technical evaluation plans; technical evaluation of proposals; cost or price evaluation or proposals; competitive range determinations; rankings of bids, proposals, or competitors; reports or evaluations or source selection panels, boards, or advisory councils; or other information marked as source selection sensitive if disclosure would jeopardize the integrity of the competitive process. *Id.* at 3.104-3. An agency official who either discloses or obtains this information faces five years confinement and a civil penalty up to $50,000. 41 U.S.C.A. § 423(a)-(b) (West 1998).

[120] 18 U.S.C. § 1905 (1994). An agency official who discloses trade secrets faces one year confinement, a fine, or both; and "shall be removed from office or employment." *Id.*

[121] CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1140 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 917 (1988). *See also* Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (defining a "trade secret" as "[A] secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.")

team proposed a slower, less efficient method. What could base officials tell the MEO team? Using sound judgment, they could only identify general deficiencies and inquire about alternate approaches, but could not suggest specific solutions. Otherwise, they risked tainting the Circular A-76 process.

V. The Recourse: Legal Challenges to Circular A-76

Using best value contracting in the BOS competition, base officials selected evaluation criteria; evaluated various factors,[122] including past performance; and communicated with the MEO team prior to award. In the end, the MEO team proposed a lower cost, and the private offeror lost. What legal recourse is available to the unsuccessful offeror? Conversely, suppose base officials had awarded the BOS contract to the private offeror. What legal recourse is available to employees? After exhausting the agency appeal process, interested parties may protest to the Comptroller General or possibly seek judicial relief in federal district court.[123] The following opinions depict some legal issues that may arise during a Circular A-76 competition.

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[122] For a comprehensive summary of Circular A-76 decisions, *see* U.S. DEP'T OF ARMY, MATERIEL COMMAND, U.S. DEP'T OF ARMY, AVIATION AND TROOP COMMAND, WHITE PAPER, MATERIEL MANAGEMENT: OUTSOURCING AND PRIVATIZATION (9 May 1997) (on file with the author).

[123] Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 12, 110 Stat. 3870, 3874 (1996) (codified at 28 U.S.C.A. § 1491 (West 1998)). This also includes recourse to the Court of Federal Claims.

A. The Recourse: Protests

The Comptroller General exercises a limited scope of review in Circular A-76 cases. Before protesting to the Comptroller General, the unsuccessful offeror must first exhaust the agency appeal procedures outlined in the Supplement.[124] Once the Appeal Authority renders a decision, the offeror has only ten calendar days to protest to the Comptroller General.[125] Moreover, the offeror must be an interested party. In a Circular A-76 protest, the Comptroller General has held that a union is not an interested party.[126] However, the Comptroller General has held that a bidder or offeror with a direct economic interest in the award is an interested party.[127] Though the Comptroller General generally defers to agency discretion, it will review Circular A-76 awards in the following situations: to ensure the

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[124] *See, e.g.*, Trans-Reg'l Mfg., Inc., B-245399, Nov. 25, 1991, 91-2 CPD ¶ 492 (dismissing protest when protester failed to raise the issue to the agency in administrative appeal); Prof'l Services Unified, Inc., B-257360.2, July 21, 1994, 94 CPD ¶ 39 (dismissing as premature protest over cost comparison); Big Picture Co., B-209380, Nov. 8, 1982, 82-2 CPD ¶ 417 (dismissing protest because agency appeal pending).

[125] *See, e.g.,* Inter-Con Sec. Sys., Inc., B-257360.3, Nov. 15, 1994, 94-2 CPD ¶ 187 (dismissing protest as untimely when protester challenging Circular A-76 solicitation waited until after agency announced cost comparison results to raise alleged improprieties) Northrop Worldwide Aircraft Services, Inc., B-212257.2, Dec. 7, 1983, 83-2 CPD ¶ 655 (dismissing appeal filed 10 days after agency decision).

[126] *See, e.g.*, Hawaii Fed'l Lodge No. 1998, Int'l Ass'n of Machinists & Aerospace Workers, B-214123, Feb. 7, 1984, 84-1 CPD ¶ 109 (finding employee union was not an interested party to protest a Circular A-76 award of housekeeping services); NAGE, Local R5-87, B-212735.2, Dec. 29, 1983, 84-1 CPD 37 (finding employee union not an interested party to protest Circular A-76 award of pest control services); Local 1662, AFGE, B-197210.2, Apr. 7, 1980, 80-1 CPD ¶ 255 (finding employee union not an interested party to protest Circular A-76 award of avionics maintenance services).

[127] *See, e.g.,* Wildcard Assoc., B-235000, July 24, 1989, 89-2 CPD ¶ 74 (finding protester in line for Circular A-76 award because federal employees who owned firm stated they would retire before award, avoiding FAR limits on awarding contracts to employees). *But see* Amn. Overseas Marine Corp; Sea Mobility, Inc., B-227965.2, B-227965.4, Aug. 20, 1987, 87-2 CPD ¶ 190 (finding protester not in line for Circular A-76 award); Joseph B. Evans, B-218047.2, Mar. 11, 1985, 85-1 CPD ¶ 296 (finding federal employee not an interested party to protest Circular A-76 award of base services); Sidney R. Jenkins, B-217045, Nov. 27, 1984, 84-2 CPD ¶ 581 (finding federal employee not interested party to protest Circular A-76 award of water plant operations).

agency followed the "ground rules," conducted a fair cost comparison,"[128] and acted in good faith.[129] The offeror must show that the agency prejudiced the process before the Comptroller General will recommend corrective action.

Two recent cases illustrate the Comptroller General's limited scope of review. In *Crown Healthcare Laundry Services*,[130] the Air Force conducted a Circular A-76 competition between the Department of Veteran's Affairs [hereinafter VA] and Crown for laundry services at Keesler Air Force Base. The VA offered a lower cost estimate, and the Air Force kept the laundry services in-house.[131] Crown challenged the award, alleging the Air Force prepared a flawed cost comparison. According to Crown, the VA based its cost estimate on performing less work than described in the PWS upon which Crown based its bid.

The Comptroller General denied Crown's protest. Initially, the Comptroller General noted that the General Accounting Office only reviews Circular A-76 awards to ensure that bidders and the agency competed on the same scope of work, and to ensure that the agency followed the Circular A-76 "ground rules."[132] After reviewing the facts, the Comptroller

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[128] *See, e.g.,* United Media Corp., B-259425.2, June 22, 1995, 95-1 CPD ¶ 289 (finding Air Force properly conducted Circular A-76 cost comparison); Tecom, Inc., B-253740.3, July 7, 1994, 94-2 CPD ¶ 11 (finding Army properly conducted Circular A-76 cost comparison). *See also* Crown Healthcare Laundry Services, Inc., B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

[129] Madison Services., Inc., B-277614, Nov. 3, 1997, 1997 WL 704459 (C.G.).

[130] Crown Healthcare Laundry Services, Inc., B-270827.2, Apr. 30, 1996, 96-1 CPD ¶ 207.

[131] The VA provided its cost estimate to the Air Force along with an interagency sharing agreement stating it would provide laundry services for Keesler Air Force Base. *Id.* at 1.

[132] *Id.* at 2 (citing DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543). In DynCorp, the Air Force converted aircraft maintenance services at Laughlin Air Force Base to in-house civilian employees rather than outsourcing the services. The protester alleged that the Air Force failed to include certain costs in its bid. The Comptroller General sustained the protest, ruling that the Air Force failed to include in its offer such costs as recruiting,

General ruled that the Air Force followed the ground rules and both sides competed equally. The Comptroller General found that the PWS allowed offerors to use their experience to estimate the contract workload, even if they reached different results. According to the Comptroller General, both Crown and the VA exercised "independent business judgment" to arrive at "different logical conclusions of doing the work."[133]

In *Madison Services, Inc.*,[134] the Air Force kept base operating services in-house after conducting a cost comparison. Madison alleged base officials acted in bad faith and "gamed" the process to favor the MEO. The Comptroller General denied the protest. Stating that agency officials presumably act in good faith, the Comptroller General found that Madison failed to show that the base officials had a "specific, malicious intent" to harm Madison.[135]

Because the Comptroller General has a limited scope of review, some protesters may have more success challenging a Circular A-76 award in federal court.

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relocating, and training new employees. However, the Air Force required the protester to include these costs in its bid. According to the Comptroller General, both the offeror and the government must compete on the same scope of work in a Circular A-76 competition. DynCorp, 89-1 CPD ¶ 543 at 4.

[133] Crown Healthcare and Laundry Services, 96-1 CPD ¶ 207, at 5. Crown further alleged that the Air Force improperly added contract administration costs to Crown's bid, but failed to add those same costs to the VA's bid. The Comptroller General ruled that the Air Force properly added these costs to Crown's bid and the VA reasonably estimated its own costs. The Comptroller General noted that Crown's bid was still higher than the VA's, even without the contract administration costs. In addition, the Air Force added to the cost estimate the salaries for government employees performing quality assurance and administrative tasks.

[134] Madison Services, Inc., B-277614, Nov. 3, 1997, 1997 WL 704459 (C.G.). *See also supra* note 112 and accompanying text.

[135] Madison Services, Inc., 1997 WL 704459, at * 2.

B. The Recourse: Federal Court

Federal court decisions indicate aggrieved protesters may successfully challenge Circular A-76 decisions in federal court under the Administrative Procedures Act [APA].[136] Until recently, courts did not provide federal employees a forum to challenge a Circular A-76 award.[137] The Sixth Circuit changed that in *Diebold v. United States.*[138] In *Diebold*, a group of civilian employees challenged the Army's decision to privatize food service operations at Fort Campbell, Kentucky. The district court dismissed the complaint, finding it did not have jurisdiction under the APA because the Army's decision was "committed to agency discretion."[139]

The Sixth Circuit reversed, finding that the employees had standing under the APA. The court reasoned that the employees' interests fell within the 1979 Office of Federal Procurement Policy Act Amendments [hereinafter OFPPAA],[140] which established the Office

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[136] Administrative Procedures Act, 5 U.S.C. §§ 701-706 (1994). The APA states that a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review" unless statute precludes judicial review or the agency action is "committed to agency discretion by law." 5 U.S.C. § 702 (1994).

[137] *See* Dep't of the Treasury, Internal Revenue Service v. FLRA, 494 U.S. 922 (1990) (holding that FLRA had discretion to determine if Circular A-76 was an "applicable law" under Title VII of the Civil Service Reform Act); Local 2855, AFGE v. United States, 602 F.2d 574 (3rd Cir. 1979) (holding that the employees lacked standing under the APA because the Army exercised agency discretion when it opted to contract out these services).

[138] Diebold v. United States, 947 F.2d 787 (6th Cir. 1991).

[139] *Id.* at 789. As the Sixth Circuit explained, a federal court may review an agency action under the Administrative Procedures Act unless the action is "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1994). An agency act is "committed to agency discretion" absent any law or other standards to measure the decision. Diebold v. United States, 947 F.2d 787, at 789.

[140] Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83, 93 Stat. 648 (codified as amended at 41 U.S.C. §§ 401-430 (1989)).

of Federal Procurement Policy [hereinafter OFPP]. The court noted that the OFPP streamlined the federal procurement process in several ways, including outsourcing. Linking the OFPPAA to Circular A-76, the court concluded that the OFPPAA was a relevant statute under the APA against which to measure an agency's outsourcing decisions.[141] The court reversed and remanded the case to the district court for further proceedings.

The Court of Appeals for the District of Columbia applied a similar rationale to aggrieved contractors in *CC Distributors v. United States*.[142] In *CC Distributors*, the Air Force converted supply stores from contractor to in-house performance. When the contractors sued, the district court dismissed their complaint for two reasons: because they lacked standing and because the Air Force exercised its discretion.[143] The District of Columbia Circuit reversed. The court held the contractors had standing to sue under the APA because DOD regulations requiring cost comparisons provided measurable standards of judicial review.[144] When converting the supply stores to in-house performance, the Air Force had to find that a commercial source was unavailable, or else perform a cost comparison to

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[141] Diebold v. United States, 947 F.2d 787, at 796-97. The court also tied the OFPPAA to 10 U.S.C. § 2462, which required the Secretary of Defense to procure supplies and services from the private sector if it can provide the supplies or services at a lower cost. The court stated this statute required "measurable, objective comparison of costs" and did not allow the Secretary of Defense to contract out as a matter of discretion. The court concluded that this statute also provided standards against which it could evaluate an agency's discretion. Diebold v. United States, 947 F.2d 787, at 797. *See also* Nat'l Air Traffic Controllers Ass'n v. Pena, No. 95-3016, 1996 WL 102421, at * 6 (6th Cir. (Ohio) Mar. 7, 1996)) (reversing district court's ruling that plaintiffs lacked standing; affirming its holding in Diebold v. United States that it may review agency decisions to privatize government services). On remand, the district court applied Circular A-76 as law to find that the plaintiffs had standing to sue in federal court. The court ruled that the plaintiffs had an interest in their federal jobs. Once they lost those jobs, they gained standing in federal court. Nat'l Air Traffic Controllers Ass'n v. Pena, 944 F.Supp. 1337 (N.D. Ohio 1996).

[142] CC Distributors v. United States, 883 F.2d 146 (D.C. Cir. 1989).

[143] *Id.* at 149. Regarding standing, the district court found the contractors failed to show it suffered any injury-in-fact from the Air Force's decision.

[144] *Id.* at 153, 156.

determine whether private contractors or in-house personnel provided the supplies more economically. Because Air Force did not have discretion, the circuit court remanded the case to the district court for further proceedings.[145]

C. The Recourse: Lessons for the Future

These opinions offer lessons for parties challenging Circular A-76 competitions. Protestors have limited recourse before the Comptroller General. *Crown Healthcare and Laundry Services* reaffirms that the Comptroller General will only review Circular A-76 awards if the agency failed to follow the procedures or conducted a faulty or misleading cost comparison. *Madison Services, Inc.* reaffirms that the Comptroller General presumes the agency acted in good faith, making it difficult for protestors to prove agency bias or bad faith. Will the hypothetical BOS offeror prevail before the Comptroller General? Perhaps, but it must show that base officials prejudiced the Circular A-76 process. Only if it meets this burden will the Comptroller General recommend corrective action.

The tide is changing in the federal courts, however. The *Diebold* and *CC Distributors* cases indicate aggrieved parties may have standing to seek judicial review of Circular A-76 awards. This trend bears watching. As DOD continues to push outsourcing, more employees and contractors will likely turn to the federal courts for relief. These cases will offer crucial lessons as DOD and the private sector participate in the "quiet revolution."

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[145] *Id.*

VI. Conclusion

After fighting General Lee for seven grueling days in 1862, a frustrated General George B. McClellan sent a telegraph from the battlefield to President Lincoln "I have seen too many dead and wounded comrades to feel otherwise that the Government has not sustained the Army. If you do not do so now the game is lost."[146]

During the Civil War, President Lincoln and generals such as McClellan had to find ways to maintain combat readiness, sometimes with scarce resources. Over a century later, things haven't changed much. Leaders are still looking for ways to maintain readiness with dwindling budgets. Only this time, the revolution is quietly reshaping how DOD does business. Fueled by the policy and process of outsourcing and Circular A-76, DOD is searching for ways to cut costs and still serve the warfighter.

Though a cost-driven process, Circular A-76 permits DOD and other agencies to use "best value." Are best value and Circular A-76 compatible? Ultimately, this raises more questions than it answers. How does the agency select evaluation factors? Why does it only evaluate the past performance of the private offeror, but not of government personnel? Do Circular A-76 and best value work at cross-purposes: one to save money, the other to promote quality? Certainly, the offeror proposing the lowest cost may also offer quality. But why should private contractors prepare best value proposals when cost rules the award? Mixing best value into the Circular A-76 recipe produces best value on a budget.

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[146] STEPHEN B. OATES, WITH MALICE TOWARDS NONE: THE LIFE OF ABRAHAM LINCOLN 304 (Harper & Row 1977) (quoting McClellan's Report, June 28, 1862, OR, ser. I, vol. XI, pt. I, 61).

Is this good for DOD? Only time will tell. Until then, Circular A-76 is here to stay. The quiet revolution has started.